

Representative Michael T. Morley proposes the following substitute bill:

CONSTRUCTION AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael T. Morley

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

This bill amends provisions of the Utah Code relating to construction contract terms, bond claims, and lien claims.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides that, unless otherwise specified by contract, the interest rate applicable to a lien or bond claim is the statutory rate of 10% per annum;
- ▶ provides that the following are not exempt from providing preliminary notice of a payment bond claim or a lien:
 - a temporary labor service company;
 - a professional employer company or organization; ~~§~~→ or
 - ~~[• a union trust fund; or]~~ ←~~§~~
 - any other entity that provides ~~§~~→ [~~or collects for~~] ←~~§~~ labor; ~~§~~→ [~~and~~]
- ▶ requires a construction contract to contain a differing site conditions clause; and
- ▶ provides that a design-build construction project contract may include provision by the contractor of operations, maintenance, or financing ; and ←~~§~~
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **14-1-19**, as enacted by Laws of Utah 1987, Chapter 218

30 **14-1-20**, as last amended by Laws of Utah 2011, Chapter 299

31 **14-2-1**, as last amended by Laws of Utah 2004, Chapter 111

32 **14-2-2**, as last amended by Laws of Utah 2004, Chapter 111

33 **14-2-5**, as last amended by Laws of Utah 2011, Chapter 299

34 **38-1-32.5**, as enacted by Laws of Utah 2011, Chapter 299

34a **Ĥ→ 63G-6-501, as renumbered and amended by Laws of Utah 2008, Chapter 382**

34b **63G-6-502, as last amended by Laws of Utah 2010, Chapter 358 ←Ĥ**

35 **63G-6-506**, as last amended by Laws of Utah 2011, Chapter 299

36 **63G-6-601**, as renumbered and amended by Laws of Utah 2008, Chapter 382

37 ENACTS:

38 **38-1-41**, Utah Code Annotated 1953

39 **53A-20-109**, Utah Code Annotated 1953

40 **63G-6-506.5**, Utah Code Annotated 1953

40a **Ĥ→ Uncodified Material Affected:**

40b **ENACTS UNCODIFIED MATERIAL ←Ĥ**



42 *Be it enacted by the Legislature of the state of Utah:*

43 Section 1. Section **14-1-19** is amended to read:

44 **14-1-19. Failure of government entity to obtain payment bond -- Right of action**
45 **-- Notice.**

46 (1) If the state or a political subdivision fails to obtain a payment bond, it shall, upon
47 demand by a person who has furnished labor or supplied materials to the contractor or
48 subcontractor for the work provided for in a contract which is subject to Section 14-1-18,
49 promptly make payment to that person. [~~That person~~]

50 (2) A person described in Subsection (1):

51 (a) shall have a direct right of action against the state or the political subdivision in any
52 court having jurisdiction in any county in which the contract was to be performed, upon giving
53 written notice to the state or political subdivision within 90 days from the date on which such
54 person performed the last of the labor or supplied the last of the material for which claim is
55 made[~~The person~~];

56 (b) shall state in the notice a designation of the construction project and its location, the

57 amount claimed, and the name of the party for whom the labor was performed or to whom the
58 material was supplied[~~-. The notice shall be served~~]; and

59 (c) shall serve the notice by registered or certified mail, postage prepaid, on the state
60 agency or political subdivision that is a party to the contract. [~~No such action may be~~
61 ~~commenced after the expiration of~~]

62 (3) An action described in this section may not be commenced later than one year after
63 the day on which the last of the labor was performed or material was supplied by [~~such~~] the
64 person bringing the action.

65 (4) Unless otherwise specified in a lawful contract between the state or the political
66 subdivision against which the claim is made and the person demanding payment, the interest
67 rate applicable to the payment or claim is the rate described in Subsection 15-1-1(2).

68 Section 2. Section **14-1-20** is amended to read:

69 **14-1-20. Preliminary notice requirement.**

70 (1) Any person furnishing labor, service, equipment, or material for which a payment
71 bond claim may be made under this chapter shall provide preliminary notice to the designated
72 agent as prescribed by Section 38-1-32.5, except that this section does not apply:

73 (a) to [~~a person~~] an individual performing labor for wages; or

74 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the
75 project or improvement for which labor, service, equipment, or material is furnished.

76 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
77 may not make a payment bond claim under this chapter.

78 (3) The preliminary notice required by Subsection (1) shall be provided prior to
79 commencement of any action on the payment bond.

80 (4) Subsection (1)(a) does not exempt the following from complying with the
81 requirements of this section:

82 (a) a temporary labor service company or organization;

83 (b) a professional employer company or organization; ~~§~~→ or

84 [~~(c) a union trust fund; or~~] ~~←~~§

85 ~~§~~→ [~~(d)~~] (c) ~~←~~§ any other entity that provides labor ~~§~~→ [or collects for labor] ~~←~~§ .

86 Section 3. Section **14-2-1** is amended to read:

87 **14-2-1. Definitions -- Payment bond required -- Right of action -- Attorney fees.**

150 commenced ~~[after the expiration of]~~ later than one year after the day on which:

151 (a) the last of the labor or service was performed; or

152 (b) the equipment or material was supplied by the person.

153 (3) In an action for failure to obtain a bond, the court shall award reasonable
154 ~~[attorneys']~~ attorney fees to the prevailing party. These ~~[attorneys']~~ attorney fees shall be taxed
155 as costs in the action.

156 Section 5. Section ~~14-2-5~~ is amended to read:

157 **14-2-5. Preliminary notice requirement.**

158 (1) Any person furnishing labor, service, equipment, or material for which a payment
159 bond claim may be made under this chapter shall provide preliminary notice to the designated
160 agent as prescribed by Section 38-1-32, except that this section does not apply to ~~[a person]~~ an
161 individual performing labor for wages.

162 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
163 may not make a payment bond claim under this chapter.

164 (3) The preliminary notice required by Subsection (1) shall be provided prior to
165 commencement of any action on the payment bond.

166 (4) Subsection (1) does not exempt the following from complying with the
167 requirements of this section:

168 (a) a temporary labor service company or organization;

169 (b) a professional employer company or organization; ~~§~~→ or ←~~§~~

170 ~~§~~→ ~~[(c) a union trust fund; or]~~ ←~~§~~

171 ~~§~~→ ~~[(d)] (c)~~ ←~~§~~ any other entity that provides labor ~~§~~→ ~~[or collects for labor]~~ ←~~§~~ .

172 Section 6. Section ~~38-1-32.5~~ is amended to read:

173 **38-1-32.5. Preliminary notice on government project.**

174 (1) (a) Except for a person who has a contract with an owner or an owner-builder or a
175 laborer compensated with wages, a subcontractor on a government project shall file a
176 preliminary notice with the database by the later of:

177 ~~[(a)]~~ (i) 20 days after the subcontractor commences the subcontractor's own work or
178 commences furnishing labor, service, equipment, or material to the construction project; and

179 ~~[(b)]~~ (ii) 20 days after the filing of a notice of commencement, if the subcontractor's
180 work commences before the filing of the first notice of commencement.

181 (b) Subsection (1) does not exempt the following from complying with the
 182 requirements of this section:

183 (i) a temporary labor service company or organization;

184 (ii) a professional employer company or organization; ~~§~~→ or ←~~§~~

185 ~~§~~→ [(iii) a union trust fund; or] ←~~§~~

186 ~~§~~→ [(iv)] (iii) ←~~§~~ any other entity that provides labor ~~§~~→ [or ←~~§~~ ←~~§~~ .

187 (2) A preliminary notice filed within the period described in Subsection (1) is effective
 188 as to all labor, service, equipment, and material that the subcontractor furnishes to the
 189 construction project, including labor, service, equipment, and material provided that the
 190 subcontractor furnishes to more than one contractor or subcontractor.

191 (3) (a) If more than one notice of commencement is filed for a project, a person may
 192 attach a preliminary notice to any notice of commencement filed for the project.

193 (b) A preliminary notice attached to an untimely notice of commencement is valid if
 194 there is also a valid and timely notice of commencement for the project.

195 (4) If a person files a preliminary notice after the period prescribed by Subsection (1),
 196 the preliminary notice becomes effective five days after the day on which the preliminary
 197 notice is filed.

198 (5) Except as provided in Subsection (8), failure to file a preliminary notice within the
 199 period required by Subsection (1) precludes a person from maintaining any claim for
 200 compensation earned for labor, service, material, or equipment furnished to the construction
 201 project before the expiration of five days after the late filing of a preliminary notice, except as
 202 against the person with whom the person contracted.

203 (6) A preliminary notice on a government project shall include:

204 (a) the government project-identifying information;

205 (b) the name, address, and telephone number of the person furnishing the labor,
 206 service, equipment, or material;

207 (c) the name and address of the person who contracted with the claimant for the
 208 furnishing of the labor, service, equipment, or material;

209 (d) the name of the record or reputed owner of the project;

210 (e) the name of the original contractor under which the claimant is performing or will
 211 perform its work; and

212 (f) the address of the project or a description of the location of the project.

213 (7) Upon request, an original contractor shall provide a subcontractor with the number
214 assigned to the project by the designated agent.

215 (8) A person who provides labor, service, equipment, or material before the filing of a
216 notice of commencement need not file a preliminary notice to maintain any right the person
217 would otherwise have, if the notice of commencement is filed more than 15 days after the day
218 on which the person begins work on the project.

219 (9) Subsections 38-1-32(2), (3), (4), (5), and (6) apply to a preliminary notice on a
220 government project under this section to the same extent that those subsections apply to a
221 preliminary notice on a private project under Section 38-1-32.

222 Section 7. Section **38-1-41** is enacted to read:

223 **38-1-41. Interest rate on lien.**

224 Unless otherwise specified in a lawful contract between the owner-builder and the
225 person claiming a lien under this chapter, the interest rate applicable to the lien is the rate
226 described in Subsection 15-1-1(2).

227 Section 8. Section **53A-20-109** is enacted to read:

228 **53A-20-109. Required contract terms.**

229 ~~H→ [(1) As used in this section, "differing site conditions clause" means a clause in a~~
230 ~~construction contract that provides for an equitable adjustment to the contract in the event that~~
231 ~~the contractor discovers, and promptly reports to the government entity that contracted for the~~
232 ~~construction, the existence on the construction site of any of the following that were not known~~
233 ~~by the contractor at the time the contract was executed:~~

234 ~~—— (a) subsurface or latent physical conditions that differ materially from the conditions~~
235 ~~indicated in the contract; or~~

236 ~~—— (b) physical conditions of an unusual nature that differ materially from those ordinarily~~
237 ~~encountered for the type of construction or for the location of the construction site.~~

238 ~~—— (2) A contract for the construction of a school building shall contain a differing site~~
239 ~~conditions clause.]~~

239a1 A contract for the construction of a school building shall contain a clause that
239a2 addresses the rights of the parties when, after the contract is executed, site conditions are
239a3 discovered that:

239a4 (1) the contractor did not know existed, and [should] could not have reasonably
239a5 known existed, at the time
239a6 that the contract was executed; and

239a7 (2) materially impacts the costs of construction.

239a **Ĥ→ Section 9. Section 63G-6-501 is amended to read:**
239b **63G-6-501. Alternative methods of construction contracting management.**
239c **(1) (a) Rules shall provide as many alternative methods of construction contracting**
239d **management as determined to be feasible.**
239e **(b) These rules shall:**
239f **(i) grant to the chief procurement officer or the head of the purchasing agency responsible for**
239g **carrying out the construction project the discretion to select the appropriate method**
239g1 **of construction ←Ĥ**

239h **H→contracting management for a particular project; and**

239i **(ii) require the procurement officer to execute and include in the contract file a written**
 239j **statement setting forth the facts which led to the selection of a particular method of construction**
 239k **contracting management for each project.**

239l **(c) Before choosing a construction contracting management method, the chief procurement**
 239m **officer or the head of the purchasing agency responsible for carrying out the construction project shall**
 239n **consider the following factors:**

239o **(i) when the project must be ready to be occupied;**

239p **(ii) the type of project;**

239q **(iii) the extent to which the requirements of the procuring agencies and the ways in which they**
 239r **are to be met are known;**

239s **(iv) the location of the project;**

239t **(v) the size, scope, complexity, and economics of the project;**

239u **(vi) the source of funding and any resulting constraints necessitated by the funding source;**

239v **(vii) the availability, qualification, and experience of state personnel to be assigned to the**
 239w **project and how much time the state personnel can devote to the project; and**

239x **(viii) the availability, qualifications, and experience of outside consultants and contractors to**
 239y **complete the project under the various methods being considered.**

239z **(2) (a) Rules adopted by state public procurement units and local public procurement units to**
 239aa **implement this section may authorize the use of a Construction Manager/General Contractor as one**
 239ab **method of construction contracting management.**

239ac **(b) Those rules shall require that:**

239ad **(i) the Construction Manager/General Contractor shall be selected using one of the source**
 239ae **selection methods provided for in Part 4, Source Selections and Contract Formation, and**
 239af **Section 63G-6-502; and**

239ag **(ii) when entering into any subcontract that was not specifically included in the Construction**
 239ah **Manager/General Contractor's cost proposal submitted under the requirements of**
 239ai **Subsection (2)(b)(i), the Construction Manager/General Contractor shall procure that subcontractor**
 239aj **by using one of the source selection methods provided for in Part 4, Source Selections and Contract**
 239ak **Formation, in the same manner as if the subcontract work was procured directly by the state.**

239al **(3) Procurement rules adopted by the State Building Board under Subsection (1) for state**
 239am **building construction projects may authorize the use of a design-build provider as one method of**
 239an **construction contracting management.**

239ao **(4) A design-build contract or a construction manager/general contractor contract may**
 239ap **include provision by the contractor of operations, maintenance, or financing.**

239aq **Section 10. Section 63G-6-502 is amended to read:**

239ar **63G-6-502. Procurement of design-build transportation project contracts.**

239as **(1) As used in this section: ←H**

239at **Ĥ→(a) "Design-build transportation project contract" means the procurement of both the**
 239au **design and construction of a transportation project in a single contract with a company or**
 239av **combination of companies capable of providing the necessary engineering services and construction.**

239aw **(b) "Transportation agency" means:**

239ax **(i) the Department of Transportation;**

239ay **(ii) a county of the first or second class, as defined in Section 17-50-501;**

239az **(iii) a municipality of the first class, as defined in Section 10-2-301;**

239ba **(iv) a public transit district that has more than 200,000 people residing within its boundaries;**

239bb **and**

239bc **(v) a public airport authority.**

239bd **(2) Except as provided in Subsection (3), a transportation agency may award a design-build**
 239be **transportation project contract for any transportation project that has an estimated cost of at least**
 239bf **\$50,000,000 by following the requirements of this section.**

239bg **(3) (a) The Department of Transportation:**

239bh **(i) may award a design-build transportation project contract for any transportation project by**
 239bi **following the requirements of this section; and**

239bj **(ii) shall make rules, by following the procedures and requirements of Title 63G, Chapter 3,**
 239bk **Utah Administrative Rulemaking Act, establishing requirements for the procurement of its**
 239bl **design-build transportation project contracts in addition to those required by this section.**

239bm **(b) A public transit district that has more than 200,000 people residing within its boundaries:**

239bn **(i) may award a design-build transportation project contract for any transportation project by**
 239bo **following the requirements of this section; and**

239bp **(ii) shall pass ordinances or a resolution establishing requirements for the procurement of its**
 239bq **design-build transportation project contracts in addition to those required by this section.**

239br **(c) A design-build transportation project contract authorized under this Subsection (3) is not**
 239bs **subject to the estimated cost threshold under Subsection (2).**

239bt **(d) A design-build transportation project contract may include provision by the contractor of**
 239bu **operations, maintenance, or financing.**

239bv **(4) (a) Before entering a design-build transportation project contract, a transportation agency may**
 239bw **issue a request for qualifications to prequalify potential contractors.**

239bx **(b) Public notice of the request for qualifications shall be given in accordance with policy**
 239by **board rules.**

239bz **(c) A transportation agency shall require, as part of the qualifications specified in the request**
 239ca **for qualifications, that potential contractors at least demonstrate their:**

239cb **(i) construction experience;**

239cc **(ii) design experience;**

239cd **(iii) financial, manpower, and equipment resources available for the project; and**

239ce **(iv) experience in other design-build transportation projects with attributes similar to the ←Ĥ**

239cf **H→** project being procured.

239cg (d) The request for qualifications shall identify the number of eligible competing proposers
239ch that the transportation agency will select to submit a proposal, which must be at least two.

239ci (5) (a) The transportation agency shall:

239cj (i) evaluate the responses received from the request for qualifications;

239ck (ii) select from their number those qualified to submit proposals; and

239cl (iii) invite those respondents to submit proposals based upon the transportation agency's
239cm request for proposals.

239cn (b) (i) Except as provided in Subsection (5)(b)(ii), if the transportation agency fails to receive
239co at least two qualified eligible competing proposers, the transportation agency shall readvertise the
239cp project.

239cq (ii) A transportation agency may award a contract for a transportation project that has an
239cr estimated cost of \$5,000,000 or less to a qualified eligible proposer if:

239cs (A) only a single proposal is received; and

239ct (B) the transportation agency determines that:

239cu (I) the proposal is advantageous to the state; and

239cv (II) the proposal price is reasonable.

239cw (6) The transportation agency shall issue a request for proposals to those qualified respondents
239cx that:

239cy (a) includes a scope of work statement constituting an information for proposal that may
239cz include:

239da (i) preliminary design concepts;

239db (ii) design criteria, needs, and objectives;

239dc (iii) warranty and quality control requirements;

239dd (iv) applicable standards;

239de (v) environmental documents;

239df (vi) constraints;

239dg (vii) time expectations or limitations;

239dh (viii) incentives or disincentives; and

239di (ix) other special considerations;

239dj (b) requires submitters to provide:

239dk (i) a sealed cost proposal;

239dl (ii) a critical path matrix schedule, including cash flow requirements;

239dm (iii) proposal security; and

239dn (iv) other items required by the department for the project; and

239do (c) may include award of a stipulated fee to be paid to submitters who submit unsuccessful
239dp proposals.

239dq (7) The transportation agency shall: ←H

239dr **H→** (a) evaluate the submissions received in response to the request for proposals from the
239ds **prequalified proposers;**
239dt **(b) comply with rules relating to discussion of proposals, best and final offers, and evaluations**
239du **of the proposals submitted; and**
239dv **(c) after considering price and other identified factors, award the contract to the responsible**
239dw **proposer whose proposal is most advantageous to the state. ←H**
240 Section **H→** [9] **11 ←H** . Section **63G-6-506** is amended to read:
241 **63G-6-506. Preliminary notice requirement.**
242 (1) Any person furnishing labor, service, equipment, or material for which a payment

243 bond claim may be made under this chapter shall provide preliminary notice to the designated
244 agent as prescribed by Section 38-1-32.5, except that this section does not apply:

245 (a) to ~~[a person]~~ an individual performing labor for wages; or

246 (b) if a notice of commencement is not filed as prescribed in Section 38-1-31.5 for the
247 project or improvement for which labor, service, equipment, or material is furnished.

248 (2) Any person who fails to provide the preliminary notice required by Subsection (1)
249 may not make a payment bond claim under this chapter.

250 (3) The preliminary notice required by Subsection (1) must be provided before
251 commencement of any action on the payment bond.

252 (4) Subsection (1)(a) does not exempt the following from complying with the
253 requirements of this section:

254 (a) a temporary labor service company or organization;

255 (b) a professional employer company or organization; ~~§~~ → or ← ~~§~~

256 ~~§~~ → [(c) a union trust fund; or] ← ~~§~~

257 ~~§~~ → [(d)] (c) ← ~~§~~ any other entity that provides labor ~~§~~ → [or collects for labor] ← ~~§~~ .

258 Section ~~H~~ → [H] 12 ← ~~H~~ . Section **63G-6-506.5** is enacted to read:

259 **63G-6-506.5. Interest rate for bond claim.**

260 Unless otherwise specified in a lawful contract between a public procurement unit and
261 the person making a bond claim against the public procurement unit, the interest rate applicable
262 to the bond claim is the rate described in Subsection 15-1-1(2).

263 Section ~~H~~ → [H] 13 ← ~~H~~ . Section **63G-6-601** is amended to read:

264 **63G-6-601. Required contract clauses -- Computation of price adjustments -- Use**
265 **of rules and regulations.**

266 (1) Rules and regulations shall require for state construction contracts and may permit
267 or require for state contracts for supplies and services the inclusion of clauses providing for
268 adjustments in prices, time of performance, or other appropriate contract provisions, and
269 covering the following subjects:

270 (a) the unilateral right of the state to order in writing changes in the work within the
271 scope of the contract and changes in the time of performance of the contract that do not alter
272 the scope of the contract work;

273 (b) variations occurring between estimated quantities of work in a contract and actual

305 modify the clauses for inclusion in any particular contract. Any variations shall be supported
 306 by a written determination that describes the circumstances justifying the variations, and notice
 307 of any material variation shall be included in the invitation for bids or request for proposals.

308 ~~¶→ [(6) (a) As used in this Subsection (6), "differing site conditions clause" means a clause~~
 309 ~~in a construction contract that provides for an equitable adjustment to the contract in the event~~
 310 ~~that the contractor discovers, and promptly reports to the public procurement unit that~~
 311 ~~contracted for the construction, the existence on the construction site of any of the following~~
 312 ~~that were not known by the contractor at the time the contract was executed:~~
 313 ~~—— (i) subsurface or latent physical conditions that differ materially from the conditions~~
 314 ~~indicated in the contract; or~~
 315 ~~—— (ii) physical conditions of an unusual nature that differ materially from those ordinarily~~
 316 ~~encountered for the type of construction or for the location of the construction site.~~
 317 ~~—— (b) Notwithstanding any provision of this chapter to the contrary, a contract for~~
 318 ~~construction entered into by a public procurement unit shall contain a differing site conditions~~
 319 ~~clause.] (6) A contract for construction entered into by a public procurement unit shall contain~~
 319a ~~a clause that addresses the rights of the parties when, after the contract is executed, site~~
 319b ~~conditions are discovered that:~~

319c ~~(a) the contractor did not know existed, and should not have known existed, at the time that~~
 319d ~~the contract was executed; and~~
 319e ~~(b) materially impacts the costs of construction.~~

319f **Section 14. Mountain View Corridor Construction.**

319g **The Department of Transportation may issue a request for proposals to construct Mountain**
 319h **View Corridor from 5400 South to I-80. The request for proposals may include the provision**
 319i **of financing by the contractor for the construction project. ←¶**